No. 18-966

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
Petitioners,

v.

STATE OF NEW YORK, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF BUSINESSES AND BUSINESS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici submit this brief to provide important context regarding how *amici* and others in the business community rely on Census data, how the proposed Citizenship Question will make Census data less reliable, and how inaccurate Census data harms businesses and consumers.

Amici include the following companies from a variety of sectors:

1. Univision Communications Inc.
2. Uber Technologies Inc.
3. Levi Strauss & Co.
4. Ben & Jerry's Homemade, Inc.
5. Warby Parker / JAND, Inc.
6. Lyft, Inc.
7. Postmates Inc.
8. Box, Inc.
9. Knotel, Inc.
10. Shutterstock, Inc.
11. General Assembly Space, Inc.
12. Casper Sleep Inc.
13. HealthEZ, Inc. / The Araz Group Inc.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

14. Cummins Inc.

15. Masimo Corporation

16. Workplace Options, LLC

17. The Cause Collection

18. Mara Hoffman Inc.

19. Lush Cosmetics LLC

20. Opening Ceremony, LLC

21. Expa, LLC

In addition, *amici* include several business organizations or associations. These organizations represent a diversity of company sizes, types, and geographical locations, spanning the entire United States. A brief description of each organization is below.

22. Tech:NYC—A nonprofit organization representing technology companies nationwide. Tech:NYC has approximately 650 member companies, including some of the most prominent and successful tech companies in the nation.

23. Minneapolis Regional Chamber of Commerce—A policy advocate supporting businesses in the Minneapolis area, including some of the nation's largest and most successful companies, on a broad range of issues.

24. Los Angeles Area Chamber of Commerce—An organization representing more than 1,650 member businesses across Los Angeles County, improving economic prosperity and quality of life for the Los Angeles region.

25. The Insights Association—An organization representing the interests of the marketing research and data analytics community. The Insights Association is the leading voice, resource and network of the marketing research and data analytics community.

Amici's interests in this case are strong. First, *amici*, like many businesses, rely on Census data to make a variety of decisions, including where to put new locations, how to market their products, or which products will be successful in a given market. Businesses also have a broader interest in ensuring that the communities that they serve receive needed federal support—in terms of education, infrastructure, and other support—in order to provide an environment ripe for new development and innovation. All of these things depend on the availability of accurate Census data. The Citizenship Question threatens to compromise the accuracy of that data.

Second, *amici* have a broader interest in protecting their employees, customers, and business partners from the negative effects of a Citizenship Question. As discussed below, there is ample evidence that the addition of a Citizenship Question will depress Census response rates, particularly among immigrant and minority communities. An inaccurate Census count will harm businesses and the communities in which they serve.

For the above reasons, *amici* have a substantial interest in this litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Accurate Census data is important to businesses. Companies use that data to plan new locations and

future projects, and they and their communities rely on important federal funding that is allocated based on Census data. But the Census Bureau's proposed Citizenship Question threatens to reduce response rates, particularly by naturalized citizens and immigrants, and thereby to impair the accuracy of the Census. The inaccuracy resulting from the Citizenship Question will harm businesses, because Census data can play a role in many decisions by large and small businesses alike.

The United States Constitution requires an "actual Enumeration" of the people to allow the "Representatives" to "be apportioned among the several States which may be included within this Union, according to their respective Numbers." U.S. Const. art. I, § 2, cl. 3. But the importance of accurate Census data extends well beyond its constitutional purpose of apportioning congressional representation. Census data is made public, *see* 13 U.S.C. § 9(a), and social scientists have called Census responses "an irreplaceable source of data for researchers," Consortium of Social Science Ass'ns, *COSSA Statement on the Impact of a Citizenship Question in the 2020 Decennial Census* (Mar. 27, 2018), https://bit.ly/2TCtAQ9. "Today, policy makers at all levels of government, as well as private businesses, households, researchers, and nonprofit organizations, rely on an accurate census in myriad ways that range far beyond the single fact of how many people live in each state." Report, Council of Economic Advisers, *The Use of Census Data: An Analytical Review* (Apr. 1, 2000), https://bit.ly/2Tv1PJP.

While businesses have a number of resources at their disposal to help them understand the characteristics, preferences, and distribution of their customers, the Census is a particularly important tool for

many purposes. *See* Paul Farhi, *For Business, Census Is a Marketing Data Motherlode*, Wash. Post (Mar. 17, 1990), https://wapo.st/2JOPI67. In the words of a large group of current and former business leaders—"[t]he decennial Census provides critical data that informs decision-making in both the private and public sectors," and which is regularly used "to determine where to locate stores and facilities, find qualified workers, and market products and services," to name just a few of its many crucial applications. A.R.1252–54, Public Comment – Ready Nation (Mar. 22, 2018).[2] But as the Census Bureau's own officials have concluded (backed by research the Bureau itself recently conducted), asking about a respondent's citizenship as part of the United States Census will result in reduced response rates, particularly by naturalized citizens and immigrants, and will thus yield inaccurate census data. *See New York* v. *U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 578–83 (S.D.N.Y. 2019). That resulting inaccuracy will be harmful to *amici* and others in the business community.

ARGUMENT

An accurate Census is a cornerstone of our democracy. Knowing that the "calculation of populations could be and often were skewed for political or financial purposes," the Framers "chose to make an 'actual Enumeration' part of our constitutional structure" in order "to preclude the availability of methods that permit political manipulation." *Utah* v. *Evans*, 536 U.S. 452, 500, 507, 510 (2002) (Thomas, J., concurring in part and dissenting in part); *see also Wisconsin* v. *City*

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[2] Because the parties and the Court have dispensed with the printing of the joint appendix, citations to "A.R." refer to the administrative record designations in the lower court.

of New York, 517 U.S. 1, 6 (1996) ("[E]ach [decennial Census] was designed with the goal of accomplishing an 'actual Enumeration' of the population."). The Census was an integral part of the design of the new government at the Founding—an attempt to ensure that the House of Representatives would be based on proportional representation, itself essential to the "Great Compromise" that yielded our bicameral legislature. *See Wesberry* v. *Sanders*, 376 U.S. 1, 12–14 (1964); *Bode* v. *Nat'l Democratic Party*, 452 F.2d 1302, 1307 (D.C. Cir. 1971).

Indeed, our nation's earliest leaders recognized the importance of Census accuracy. For instance, when Thomas Jefferson supervised the nation's first Census as Secretary of State in 1790, he expected a population count of at least 4 million people. Yet the Census ultimately revealed a nation of just 3.9 million people, much to the surprise and concern of Jefferson and President George Washington. Jefferson thought that the Census had significantly undercounted the population, perhaps by several hundred thousand residents. United States Census Bureau, *Directors 1790 – 1810* (Aug. 2, 2017), https://bit.ly/2VKtnrs. And Washington, who had expected a population count about five percent higher, was similarly chagrined, blaming the "'inaccuracy' on avoidance by some residents as well as on negligence by those responsible for taking the census." Kenneth Prewitt, *The American People Census 2000: Politics and Science in Census Taking* 6 (Russell Sage Foundation 2003), https://wapo.st/2NWwjyp. By making these concerns about the Census public, then-Secretary Jefferson "helped alert the Nation to the importance of accuracy in the numbers used to describe the society." 154 Cong. Rec. H4890 (June 4, 2008) (statement of Rep. Johnson).

In the 1850s, Congress expanded the Census's traditional role and included a number of questions on the Census aimed at learning more about the characteristics of the U.S. population. *See* Douglas A. Kysar, *Kids & Cul-de-Sacs: Census 2000 and the Reproduction of Consumer Culture*, 87 Cornell L. Rev. 853, 862 (2002). At the turn of the twentieth century, as the Census grew more complex, Congress created the Census Bureau, which opened its doors in 1902. *See* Permanent Census Act, Pub. L. No. 27 (1902). By that time, the Census's mission to "foster, promote, and develop the foreign and domestic commerce" was codified, 15 U.S.C. § 1512, and the Census Bureau's energies "were directed toward the improvement of business statistics, . . . and toward the collection of data that might foster improvements in the national economy without the heavy hand of government 'planning,'" Kysar, *supra*, at 862–63 (some internal quotation marks omitted). To that end, Congress authorized the Secretary of Commerce to "obtain . . . census information as necessary." 13 U.S.C. § 141(a). But as the district court recognized, the Secretary does not have unfettered discretion in carrying out that task. Instead, his decisions regarding the Census are judicially reviewable, and so a decision of the Secretary to add or remove a Census question must comply with all relevant laws, including the APA. *See Dep't of Commerce*, 351 F. Supp. 3d at 628–30.

In assessing the impact of various questions, the Secretary, the Commerce Department, and the Census Bureau must take into account the impact of the question on the conduct of the Census and on various communities. *Cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A failure to consider an "important aspect of the problem," such as "evidence that runs counter to

the agency's decision," will render agency action arbitrary and capricious. *Genuine Parts Co.* v. *EPA*, 890 F.3d 304, 307 (D.C. Cir. 2018) (internal quotation marks omitted). Courts have not hesitated to vacate agency action where the agency failed to meet this mandate. *See, e.g.*, *Colo. Fire Sprinkler, Inc.* v. *NLRB*, 891 F.3d 1031, 1041 (D.C. Cir. 2018); *Islander E. Pipeline Co.* v. *Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 101 (2d Cir. 2006).

Both district courts that have reviewed the Secretary's decision have concluded that the Secretary failed in this obligation. The United States District Court for the Southern District of New York concluded that the Secretary of Commerce, in deciding to adopt the Citizenship Question, violated the Administrative Procedure Act ("APA") in three ways. First, the Secretary violated 13 U.S.C. §§ 6(c) and 141(f) by failing to use information from administrative records to the maximum extent possible and by failing to include citizenship as a subject to be included on the 2020 Census in his report to Congress. *Dep't of Commerce*, 351 F. Supp. 3d at 636–47. Second, the Secretary's decision was arbitrary and capricious because he "'entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id.* at 647–60 (quoting *State Farm* , 463 U.S. at 43). And third, the Secretary's offered rationale was pretextual. *Id.* at 660–64. On March 6, 2019, the United States District Court for the Northern District of California similarly ruled that the Citizenship Question violated the APA, as well as the Enumeration Clause. *See California* v. *Ross*, No. 18-cv-1865, 2019 WL 1052434 (N.D. Cal. Mar. 6, 2019).

All available evidence confirms that the Citizenship Question will impair the accuracy of the Census. *See Dep't of Commerce*, 351 F. Supp. 3d at 594. For decades, the Census Bureau has recognized the negative impact a Citizenship Question would have, telling a court in 1980 that "any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count" because "[q]uestions as to citizenship are particularly sensitive in minority communities and would inevitably trigger hostility, resentment and refusal to cooperate." *Fed'n for Am. Immigration Reform* v. *Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980). And even *recent* research by the Census Bureau confirms that multilingual Census respondents fear their answers will not be kept confidential, and may be reluctant to answer certain questions for that reason. *See* Mikelyn Meyers & Patricia Goerman, U.S. Census Bureau, *Respondent Confidentiality Concerns in Multilingual Pretesting Studies and Possible Effects on Response Rates and Data Quality for the 2020 Census* 24–25 (May 2018). Indeed, research shows that respondents are becoming more hesitant to answer a comparable question about citizenship included in the American Community Survey. *See* William P. O'Hare, Geo. Ctr. on Poverty and Inequality, *Citizenship Question Nonresponse: A Demographic Profile of People Who Do Not Answer the American Community Survey Citizenship Question* 6–7 (Sept. 2018).

Lower response rates mean less accurate Census data, which will have negative effects on *amici* and other businesses that use Census data in a variety of ways to plan their operations and products.

I. Inaccurate Census Data Will Harm Businesses That Rely On The Census For Marketing, Product Development, Operations, And Other Purposes

Businesses have long used Census data in a variety of strategic ways to plan their operations, enhance their understanding of their customer base, and develop products that meet consumer needs. *See* Kysar, *supra*, at 854–56. The Census Bureau itself recognizes the value businesses derive from the types of data the Census provides; it even provides companies with a "Census Business Builder," which is "a suite of services that provide selected demographic and economic data from the Census Bureau tailored to specific types of users in a simple to access and use format." U.S. Census Bureau, *Census Business Builder* (Dec. 13, 2018), https://bit.ly/22wd3s0. The Bureau notes that this data can "help you start or grow a business or understand the business landscape for a region." *Id.*; *see also* SBA, *Market Research and Competitive Analysis*, https://bit.ly/2wXJvvw.

Assuming the Census Bureau's own "conservative estimate" is accurate that the Citizenship Question will result in a 5.8 percent decline in Census response, *Ross*, 2019 WL 1052434, at *28; *Dep't of Commerce*, 351 F. Supp. 3d at 566, 580, the 2020 Census would result in significantly flawed data, undercounting millions of people. This undercounting would be particularly problematic in the country's largest markets. *See Ross*, 2019 WL 1052434, at *22 (noting that "San Jose's percentage of noncitizens is nearly two-and-a-half times the national percentage"); *Dep't of Commerce*, 351 F. Supp. 3d at 588, 595 ("New York City is a prime example. New York City contains approxi-

mately forty-three percent of the total state population, but approximately seventy-one percent of the state's noncitizen population."); *id.* (cataloguing largest urban markets affected by even a two percent drop in response rate). For businesses, undercounting hundreds of thousands or even millions of people matters, particularly in the context of low-margin industries where even slight adjustments of data could materially affect the accuracy of projected revenue and costs.

If the Citizenship Question is adopted—rendering Census data less accurate—each business that uses Census data for these purposes will be harmed.

A. Inaccurate Census Data Will Harm Businesses That Use Census Data In Deciding Where To Open New Locations

Businesses rely on Census data when they plan the placement and construction of new locations or markets. That data lets businesses maximize the effectiveness of a location and capitalize on a particular region's needs or preferences. Building a new location is a significant undertaking, requiring major capital investments. *See* Melissa Martin, *Costs of Starting a Business: Bricks & Mortar Retail Startup*, StartupNation (June 8, 2006), https://bit.ly/2Cf4vRr. Mistakes about where to place a store, warehouse, or other facility can harm not only a business's overall outlook, but also the communities that need (or don't need) such a facility.

Many retail merchants use Census data to strategically place their stores and other facilities. *See* Amy Merrick, *New Data Will Let Starbucks Plan Store Openings, Help Blockbuster Stock Its Videos*, Wall St. J. (Feb. 14, 2001), https://on.wsj.com/2V0hFck; Starbucks Corp. Investor Call Tr. (Dec. 5, 2012),

https://bit.ly/2UkrxjZ (highlighting value of "the demography, the data, the science" in site selection and new store openings). Some businesses, like *amicus* Warby Parker (an innovative brand providing access to affordable, high-quality eyewear), rely on Census data to evaluate what makes a market desirable and where to place stores within a market. *See* Tom Foster, *Warby Parker Grew to $250 Million in Sales Through Disciplined Growth. Now It's Time to Get Aggressive*, Inc. (June 2017), https://bit.ly/2rZ2HEx. And *amicus* Uber Technologies uses Census data to optimize locations for where its JUMP bikes are deployed. Others look at the Census profile for a new area to see how it compares with an existing market and to determine whether a new location is likely to generate more, less, or the same business. *See* Jonathan Weber, *Census Data Assists Business Where It Counts: Accurate Demographics*, L.A. Times (Jan. 2, 1990), https://lat.ms/2NYuuRF.

A business might use Census data to target a small location in a state where its customers are most likely to reside and where a new location could be profitable. *See* Paul R. Voss, *Targeting Wealthy Ex-Wisconsinites in Florida: A Case Study in Applied Demography, in Demographics: A Casebook for Business and Government* 109 (Hallie J. Kintner et al. eds., 1997). The Census Bureau even provides an interactive population map that businesses can use to examine population data "at the most granular level," including "age, race, ethnicity and housing status." Jenny Dinnen, *3 Ways You Can Use Census Data*, MacKenzie Corporation (Oct. 23, 2013), https://bit.ly/2NWy5Q5. Without accurate Census data on which to base location decisions, businesses would lose a tool that has become crucial to their survival and growth.

The effects of inaccurate Census data on a company's decision of where to place a new location would harm not only that business, but also its surrounding community. Accurate data helps businesses take risks on changing and developing neighborhoods. Unreliable data might mean businesses will open fewer locations in new communities, depriving businesses of new markets and communities of new stores or services.

Healthcare providers provide a good example of this effect because they use Census data to understand community needs. *See* National Research Council, *Modernizing the U.S. Census* 297 (1995). A hospital can use Census data regarding residents in the area of a new location to determine how many and what kind of doctors will likely be needed at that location. *See id.* This same analysis can be performed to determine the need for certain health services in a given area—for example, a region densely populated with young families will be more in need of obstetrical or family practice services than a region populated primarily with retirees. *See id.* at 298; *see also* Richard K. Thomas, *Using Demographic Analysis in Health Services Planning: A Case Study in Obstetrical Services, in Demographics*, in *Demographics: A Casebook for Business and Government* 159, 167–68 (RAND Corp. 1997) (examining the age of women in an area to determine the need for a new obstetrical facility). Inaccurate Census data thus may lead to some communities having inadequate healthcare in light of business decisions driven by this data, just as other communities may face an inefficient influx of healthcare resources beyond what is actually needed.

Census data also allows businesses to learn about their local communities and work to serve those communities. *Amicus* Box, Inc., for example, uses Census data to determine which areas in its community are in need of volunteer support, and coordinates its employees' volunteer efforts in those areas.

With a Census whose accuracy is impaired by the Citizenship Question, businesses will have less ability to design and build stores and service locations that meet the needs of local communities. Businesses, their customers, and the communities they serve will all suffer.

B. Inaccurate Census Data Will Harm Businesses That Use Census Data In Product Development, Marketing, And Placement

Inaccurate Census data will also affect the development and marketing of numerous products around the country. Businesses use Census data to inform decisions about product development and placement. A retail business may, for instance, rely on demographic data to determine which products are going to sell best in which regions, and calibrate each store's stock accordingly. *See* Diane W. Schanzenbach & Michael R. Strain, *Act Now to Save the 2020 Census*, Bloomberg Opinion (Aug. 11, 2017), https://bloom.bg/2vUz64R ("If you walk into a Target store in suburban Florida, the items on the shelves are different from what is in a Target store in downtown Washington D.C. Target makes these decisions in large part using government data."). As the Association of National Advertisers has explained, "[m]arketing decisions/investments are often made based on population counts," and inaccurate data would affect data businesses "rely on to quantify the marketplace,

and thereby undersize the business opportunity." Ass'n of Nat'l Advertisers, *ANA Members Oppose Addition of Citizenship Question for 2020 Census* (June 12, 2018), https://bit.ly/2U7TwTH.

Entire product lines may even be developed based on data culled from the Census. *See, e.g.*, *The Use of Census Data: An Analytical Review*, *supra* (noting that accurate Census data helps "[m]anufacturers of baby products such as baby food, clothes, diapers, and toys, and manufacturers of maternity clothes and greeting cards . . . develop . . . their product lines"). And even independent market research can be aided by the Census—market researchers can use Census data to make accurate inferences about survey answers based on their geographic location or their other survey responses. *See* Upfront Analytics, *Why Census Data Is Useful for Market Research* (May 14, 2015), https://bit.ly/1CS6lnJ.

Flawed Census data can also impact customer outreach. For example, because utility companies often offer lower rates for poorer, elderly, or disabled customers, utility companies use Census data to determine which areas are most likely to need those special rates and reach out to customers in those areas to evaluate eligibility. *See Modernizing the U.S. Census*, *supra*, at 297. Cable television companies may use Census data to target advertising for pay-per-view events to those areas whose residents are most likely to purchase the event. *See id.* at 296. And when a car manufacturer learned through customer research that its vehicles were popular with people in the nursing profession, it used data from the Census to tailor its regional advertising to that demographic. *See* Kysar, *supra*, at 885. Inaccurate Census data would

weaken the ability of businesses to adapt their marketing and outreach strategies to a changing population, resulting in wasted dollars for businesses and unwanted advertising for customers.

C. Inaccurate Census Data Will Impair The Accurate And Equitable Allocation Of Federal Support

The federal government relies on Census data to allocate and distribute federal support and funding, and inaccurate Census data threatens to harm businesses and their communities who rely on that support. For example, under the New Market Tax Credit ("NMTC")—a federal program designed to stimulate investment in distressed communities—a business investment may qualify for special tax treatment if it occurs in an area with certain concentrations of low- or moderate-income households. *See* Comty. Dev. Fin. Insts., *New Markets Tax Credit Program*, https://bit.ly/1H54VZx; Robert Shapiro, *The 2020 Census May Be Wildly Inaccurate—And It Matters More Than You Think*, Brookings Inst. (Aug. 31, 2017), https://brook.gs/2gw9BQY.[3] Or a nonprofit organization, such as a rural health clinic, may use Census data for a special federal designation based on location and population served. *See Modernizing the U.S. Census*, *supra*, at 298. Businesses rely on Census data to know whether they will be entitled to federal support, and inaccurate Census data risks depriving businesses of that needed support.

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[3] An NMTC-eligible investment must be located in a designated "low-income community," defined by U.S. Census data as a Census tract with a poverty rate of at least 20 percent or with a median family income that does not exceed 80 percent of the statewide median family income. 26 U.S.C. § 45D(e).

More broadly, the federal government relies on Census data to allocate and distribute federal funding—to the tune of about $700 billion—and inaccurate Census data can therefore affect businesses that rely directly or indirectly on those funds. *See* A.R.8375, Public Comment – Coalition of Philanthropic Organizations (Mar. 21, 2018) ("[R]ecent decennial censuses have resulted in net undercounts of many communities, with consequences for . . . disbursing roughly $700 billion in federal funds."). In 2015 alone, the federal government used Census data to distribute over $675 billion in federal funding to a variety of programs. *See* Marisa Hotchkiss & Jessica Phelan, *Uses of Census Bureau Data in Federal Funds Distribution: A New Design for the 21st Century* 3 (Sept. 2017) (on file with the U.S. Census Bureau); *see also Wisconsin*, 517 U.S. at 5–6 ("Today, census data also have important consequences not delineated in the Constitution: The Federal Government considers census data in dispensing funds through federal programs to the States . . . ."). Those billions of dollars were funneled through 132 different programs, ranging from subsidies for school lunches to historic preservation. *See* Hotchkiss & Phelan, *supra*, at 16–17.

The bulk of Census-guided federal assistance goes to state governments through a handful of grant programs that aid low-income households and support highway infrastructure. *See* Andrew D. Reamer, *Counting for Dollars: The Role of the Decennial Census in the Geographic Distribution of Federal Funds* 10, Brookings Inst. (Mar. 9, 2010), https://brook.gs/2Tz7Bdt.[4] In 2008, using Census

[4] In 2008, $261.1 billion was distributed to states through Medicaid, the largest Census-guided assistance program. *See* Reamer, *supra*, at 10.

data, the federal government distributed over $36 billion in federal funds via the Federal-Aid Highway Program, and distributed an additional $10 billion to fund other transportation needs. *See id.* at 11–12. Businesses have an interest in ensuring that the basic infrastructure of their communities—including the availability of accessible and well-kept highways—is supported by federal funding. That is especially true for businesses who depend on federally supported highways for the transportation of goods. And an inaccurate Census threatens the proper allocation of that funding.

Businesses also have an interest in the federal funding allocated to other programs. For example, through the Workforce Innovation and Opportunity Act ("WIOA"), the federal government subsidizes the education and workforce training of youths and adults from disadvantaged backgrounds and areas. *See* 29 U.S.C. §§ 3162, 3172. The allocation of those subsidies is determined using the "most recent satisfactory data from the Bureau of the Census." 29 U.S.C. § 3242(a). And some organizations, like *amicus* General Assembly, enroll students that rely on that federal funding, or offer programs that are funded by WIOA. The Department of Labor allocated over $7 billion in 2008 on the basis of Census data, *see* Reamer, *supra*, at 13, some of which went to educational institutions like *amicus* General Assembly to provide free training programs to underserved and overlooked talent.

Companies may have more specific interests depending on their size or line of business. For example, many new businesses have an interest in the federal funding that goes to Small Business Development Centers, which receive federal funding to provide

small companies and entrepreneurs with free consulting and training services. *See* SBA, *Small Business Development Center*, https://bit.ly/1D3081I. A local outdoors-equipment retail store, whose business depends in part on the availability and quality of nearby outdoor activities, will likely have an interest in ensuring that the surrounding community is receiving adequate support from federal programs such as the Wildlife Restoration Program, *see* U.S. Fish & Wildlife Serv., *Wildlife Restoration Program – Overview* (Feb. 2, 2018), https://bit.ly/2BgEZeA (providing funding to restore, conserve, manage, and enhance wild birds and mammals and their habitat); *see also* U.S. Fish & Wildlife Serv., *State Wildlife Grant Program – Overview* (Feb. 2, 2018), https://bit.ly/2CcPMXa (providing funding to develop and implement programs that benefit wildlife and their habitats), and the Water Pollution Control Grant Program, *see* EPA, *Learn About the Water Pollution Control (Section 106) Grant Program* (Jan. 19, 2018), https://bit.ly/2EUinRj (providing funding to states and agencies to build and sustain effective water quality programs), both of which rely on the Census to determine allocation of funding.

Established businesses in communities may also have a more general interest in ensuring that the communities they serve—and that make up their customer and employee bases—are receiving the needed federal assistance to which they are entitled. The U.S. Department of Education, for instance, relies on Census data to allocate funds to educational agencies and schools with high numbers or percentages of children from low-income families. *See* U.S. Dep't of Educ., *Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A)*, (Oct. 24, 2018), https://bit.ly/2lQzI5X. The Department of Education allocated over $10 billion in special education grants

to states in 2008, based in large part on Census data. *See* Reamer, *supra*, at 11. It distributed over $7 billion in Title I grants to local educational agencies during the same time period. *Id.* Businesses in such a community, like all members of a community, benefit from strong educational programs, particularly when that business depends on an educated local workforce to staff its facilities. Federal funds are also allocated through Community Development Block Grant Programs—again on the basis of Census data—to help develop urban communities and improve living and economic conditions. *See* HUD Exchange, *CDBG: Community Development Block Grant Programs*, https://bit.ly/2VSnCb1. Again, businesses benefit when their communities receive the infrastructure support they need to thrive. But an inaccurate Census risks misallocating funds to each of these programs, harming businesses and their communities.

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These varied and documented uses of Census data are possible only because businesses can depend on the Census to provide accurate demographic information about customers and to determine how best to engage in their local communities. As the district court found, however, the Citizenship Question threatens to undermine that reliability of Census data, *see Dep't of Commerce*, 351 F. Supp. 3d at 594, and therefore substantially reduce its value to businesses. If businesses cannot rely on the Census to provide usable, accurate data, they will be hamstrung in their ability to track and adapt to customers' changing needs and preferences. Competitive businesses must always be evolving to respond to changes in the market, and the Citizenship Question will impede their ability to do so.

II. INACCURATE CENSUS DATA WILL IMPACT BUSINESSES MORE SUBSTANTIALLY AS THEY BECOME INCREASINGLY DATA-DRIVEN

Inaccurate Census data would be especially disruptive to businesses today. Companies increasingly rely on data-driven analytics to provide products and services that meet customers' specific needs and wants. While businesses in the past adopted a more product-oriented approach—focusing on designing products they believed customers would want—businesses now operate on a more customer-oriented basis, seeking to understand customers' needs before they invest resources into design and implementation. *See* Chris Rygielski et al., *Data Mining Techniques for Customer Relationship Management*, 24 Tech. in Soc'y 483, 484 (2002). The value of accurate and complete data is heightened by the need for businesses to respond quickly to changing market conditions and preferences. *See* Syed Riaz Ahmed, *Applications of Data Mining in Retail Business*, Proceedings of the Int'l Conference on Info. Tech.: Coding and Computing, at 2 (2004). Companies seeking to gain a competitive edge over their competitors therefore rely on their ability "to better manage the knowledge regarding the critical elements of their environment." John H. Heinrichs & Jeen-Su Lim, *Integrating Web-Based Data Mining Tools with Business Models for Knowledge Management*, 35 Decision Support Sys. 103, 105 (2003).

By way of example, *amicus* Uber Technologies has a policy team that uses Census data to conduct research with respect to high-level policy issues implicated by Uber's business, including issues related to the impact of Uber's services on different neighborhoods and communities. This research is important

to Uber's outreach with respect to its drivers, riders, and third-party stakeholders. *Amicus* Box, Inc. leverages Census data through tailored reports that Box receives from third-party vendors compiling salary bands for different geographic areas. Census data has been, and will continue to be, integral to this modern focus, rendering an accurate Census imperative to business growth and innovation. *See* A.J. Agrawal, *Why Data Is Important for Companies and Why Innovation Is On the Way*, Inc. (Mar. 24, 2016), https://bit.ly/2qY77iM (asserting that in an era in which "[p]eople are generating more [data] than ever before," this data is becoming "essential for companies and it's going to spell an era of innovation").

The emphasis on data analytics has led to the rise of entire businesses built around processing and analyzing demographic data, and advising consumers based on that data—including that provided in the Census. Census data can be complicated (and costly) to organize and interpret, and some businesses specialize in translating that raw data into usable information. *See* Weber, *supra*; *see also Alteryx Powers U.S. Census Data Analysis* (Aug. 27, 2012), https://bit.ly/2JPFxy8. Such companies may offer business analytics solutions based, in part, on Census data to assist with these location decisions. *See* Esri Demographics, *Census and ACS*, https://bit.ly/2EMfhic. Other entities use Census data to forecast demographic trends and provide those projections to businesses who are looking for growth opportunities. *See Claritas Demographic Update Methodology*, Claritas (Sept. 2006), https://bit.ly/2tZK865; Geolytics, *Estimates/Projects*, https://bit.ly/2Wh6Cf0 (noting that its estimates and projects are "ideally suited for business users and researchers who need to know where to market, where to expand, and how to

allocate resources"). These companies specialize in the provision of Census-based segmentation services—an analysis that divides up the U.S. population into various segments sharing key traits and behavioral patterns that can be used to predict consumer behavior. *See Kysar*, *supra*, at 880–81. And these businesses rely, of course, on accurate Census data to provide those services.

Census data is also critical to understanding and making use of marketing research gathered through other means. Many businesses have commercial databases that store information about their customers and target audience. *See* Scott McDonald, *A 2020 Census Flop Would Pose a Danger to U.S. Businesses*, Forbes (Dec. 6, 2017), https://bit.ly/2Uv6ckz. But marketing research gathered from a sample population can be skewed or inaccurate, and so businesses rely on Census data to provide a benchmark to "evaluate the quality of the dataset and provide a basis for statistical adjustments." *Id.* The accuracy of Census data thus even affects the quality of independent market research: "Marketing is based on consumers in markets, not citizens in markets." Ass'n of Nat'l Advertisers, *supra* ("As a business user of the data, we need the census to accurately reflect all segments of our society. Non-citizen residents contribute a great deal to many economies. Marketers need to understand who truly lives and works in the U.S.").

Census data is also critical to business because that data is used validate other national surveys key to most American businesses, including the American Community Survey (ACS)—formerly the decennial census long form—and the Economic Census. The ACS is particularly important to data-driven businesses. Realtors, for instance, use the ACS and the

census to "develop insights on market trends and policy issues." Letter from Nat'l Ass'n of Realtors to Sen. Claire McCaskill (Feb. 25, 2018), https://bit.ly/2HQ1dHF. But the ACS itself depends on accurate Census data. *See* Andrew Reamer, Geo. Wash. Inst. of Pub. Policy, *Counting for Dollars: A Study of Census-guided Financial Assistance to Rural America* (Oct. 11, 2018), https://bit.ly/2Onk0LO. If the Citizenship Question is adopted and depresses response rates, "[e]very subsequent survey and study that intends to be statistically representative of the U.S. population will be built on decennial data, including the American Community Survey (ACS), the Economic Census and every other federal government survey, and any inaccuracies will be felt for at least a decade." Howard Fienberg, *Remove the Citizenship Question from 2020 Census, Says Marketing Research & Data Analytics Industry*, Insights Ass'n (Aug. 7, 2018), https://bit.ly/2OVzhDi.

Location intelligence providers repurpose Census data to provide insights to customers and to help them draw better, data-driven inferences about how to run their organizations. *See* Greg Sterling, *Chipotle Customers Are Smarter Than McDonald's And Other Insights From Smartphone Data*, Mktg. Land (June 24, 2014), https://mklnd.com/2ESReye. Real estate aggregators can use Census data to compile their listings and real estate estimates. *Zillow: Ahead of Its Time or Falling Behind*, Harv. Bus. Sch.: Open Knowledge by Digital Initiative (Nov. 18, 2016), https://bit.ly/2VSEjU0/; *see also Census Data Trends*, Zillow Blogs (Sept. 13, 2006), https://bit.ly/2VSEkr2. Businesses like these depend on advanced data processing, and among the information these businesses process is Census data, the accuracy of which is and will continue to be essential to their success.

* * *

Although it is impossible to determine how innovators and entrepreneurs will use Census data in the future, one thing is clear: businesses will keep using it in important ways so long as it is accurate. They will seek to leverage key data and determine new, profitable uses to draw from it. Ensuring the accuracy of this data is essential, and any attempt by the federal government to diminish the Census impairs the ability of businesses across the country to be effective.

CONCLUSION

For the foregoing reasons, *amici curiae* request that this Court affirm the judgment below.

Respectfully submitted.

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